Order

Michigan Supreme Court
Lansing, Michigan

August 25, 2009

Marilyn Kelly,
Chief Justice

ADM File No. 2009-07

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
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Justices

Proposed Amendments of Rules
7.105, 7.204, 7.205, and 7.302
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 7.105, 7.204, 7.205, and 7.302 of the Michigan Court Rules. Before the Court determines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposed amendment or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Proposed additions are indicated in underlining and
proposed deletions are indicated in overstriking.]

Rule 7.105 Appeals from Administrative Agencies in "Contested Cases"

(A) [Unchanged.]

(B) Scope; Timeliness of Appeal from Decision or Order of Michigan Department of Corrections Hearing Division

(1) This rule governs an appeal to the circuit court from an agency decision in a contested case, except when a statute requires a different procedure. A petitioner intending to rely on a different procedure permitted by statute shall identify the statutory procedure in the petition for review. Failure to do so waives the right to use the different procedure.

(2) The court need not dismiss an action incorrectly initiated under some other rule, if it is timely filed and served as required by this rule and the applicable statute. Instead, leave may be freely given, when justice requires, to amend an appeal and a response to conform to the requirements of this rule and otherwise proceed under this rule.

(3) For purposes of appeal of a final decision or order issued by the hearings division of the Michigan Department of Corrections, if an application for leave to appeal the decision or order is received by the court more than 60 days after the date of delivery or mailing of notice of the decision on rehearing, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications from decisions or orders of the hearings division rendered on or after _____ [a date no more than two months before the effective date of the proposed rule.]

(C)-(O)[Unchanged.]

Rule 7.204 Filing Appeal of Right; Appearance

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) [Unchanged.]

(2) An appeal of right in a criminal case must be taken

(a) in accordance with MCR 6.425(G)(3);

(b) within 42 days after entry of an order denying a timely motion for the appointment of a lawyer pursuant to MCR 6.425(G)(1);

(c) within 42 days after entry of the judgment or order appealed from; or

(d) within 42 days after the entry of an order denying a motion for a new trial, for directed verdict of acquittal, or to correct an invalid sentence, if the motion was filed within the time provided in MCR 6.419(B), 6.429(B), or 6.431(A), as the case may be.

A motion for rehearing or reconsideration of a motion mentioned in subrules (A)(1)(b) or (A)(2)(d) does not extend the time for filing a

claim of appeal, unless the motion for rehearing or reconsideration was itself filed within the 21- or 42-day period.

(e) If a claim of appeal is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the claim shall be deemed presented for filing on the date of deposit of the claim in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to claims of appeal from decisions or orders rendered on or after _____ [a date no more than two months before the effective date of the proposed rule.] This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(3) Where service of the judgment or order on appellant was delayed beyond the time stated in MCR 2.602, the claim of appeal must be accompanied by an affidavit setting forth facts showing that the service was beyond the time stated in MCR 2.602. Appellee may file an opposing affidavit within 14 days after being served with the claim of appeal and affidavit. If the Court of Appeals finds that service of the judgment or order was delayed beyond the time stated in MCR 2.602 and the claim of appeal was filed within 14 days after service of the judgment or order, the claim of appeal will be deemed timely.

(B)-(H) [Unchanged.]

Rule 7.205 Application for Leave to Appeal

(A) Time Requirements. An application for leave to appeal must be filed within

(1) 21 days after entry of the judgment or order to be appealed from or within other time as allowed by law or rule; or

(2) 21 days after entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within further time the trial court has allowed for good cause during that 21-day period.

For purposes of subrules (A)(1) and (A)(2),"entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(3) If an application for leave to appeal in a criminal case is received by the court after the expiration of the periods set forth above, and if the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the claim as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement, which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications for leave to appeal from decisions or orders rendered on or after _____ [a date no more than two months before the effective date of the proposed rule.] This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(B)-(G) [Unchanged.]

Rule 7.302 Application for Leave to Appeal

(A)-(B)[Unchanged.]

(C) When to File.

(1) Before Court of Appeals Decision. In an appeal before the Court of Appeals decision, the application must be filed within 42 days

(a) after a claim of appeal is filed in the Court of Appeals;

(b) after an application for leave to appeal is filed in the Court of Appeals; or

(c) after entry of an order by the Court of Appeals granting an application for leave to appeal.

(2) Other Appeals. Except as provided in subrule (C)(4), in other appeals the application must be filed within 42 days in civil cases, or within 56 days in criminal cases,

(a) after the Court of Appeals clerk mails notice of an order entered by the Court of Appeals;

(b) after the filing of the opinion appealed from; or

(c) after the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing.

However, the time limit is 28 days where the appeal is from an order terminating parental rights or an order of discipline or dismissal entered by the Attorney Discipline Board.

(3) Later Application, Exception. Late applications will not be accepted except as allowed under this subrule. If an application for leave to appeal in a criminal case is received by the clerk more than 56 days after the Court of Appeals decision, and the appellant is an inmate in the custody of the Michigan Department of Corrections and has submitted the application as a pro se party, the application shall be deemed presented for filing on the date of deposit of the application in the outgoing mail at the correctional institution in which the inmate is housed. Timely filing may be shown by a sworn statement which must set forth the date of deposit and state that first-class postage has been prepaid. The exception applies to applications from decisions of the Court of Appeals rendered on or after _____ [a date no more than two months before the effective date of the proposed rule.] This exception also applies to an inmate housed in a penal institution in another state or in a federal penal institution who seeks to appeal in a Michigan court.

(4) Decisions Remanding for Further Proceedings. If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave may be filed within 28 days in appeals from orders terminating parental rights, 42 days in other civil cases, or 56 days in criminal cases, after

(a) the Court of Appeals decision ordering the remand,

(b) the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing of a decision remanding the case to the lower court for further proceedings, or

(c) the Court of Appeals decision disposing of the case following the remand procedure, in which case an application may be made on all issues raised in the Court of Appeals, including those related to the remand question.

(5) Effect of Appeal on Decision Remanding Case. If a party appeals a decision which remands for further proceedings as provided in subrule (C)(4)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

(b) If the Court of Appeals decision is an order other than a judgment under MCR 7.215(E)(1), the proceedings on remand are not stayed by an application for leave to appeal unless so ordered by the Court of Appeals or the Supreme Court.

(6) Orders Denying Motions to Remand. If the Court of Appeals has denied a motion to remand, the appellant may raise issues relating to that denial in an application for leave to appeal from the decision on the merits.

(D)-(H)[Unchanged.]

KELLY, C.J. I have proposed the adoption of a prison mailbox rule in Michigan because I see the Court being asked frequently to determine if pro se criminal appeals were timely filed.[1] Usually, the prisoner-appellant insists that he or she put the appeal in the hands of prison authorities before the deadline for filing, but it arrived at the Court late. As a consequence, the prisoner's appeal of right was lost. A prison mailbox rule could resolve most of these controversies. Under this rule, if the appeal is delivered to prison authorities within the filing deadline, it is considered timely filed. If not, it is untimely.

The problem of late criminal pro se filings arises in large part from the unique situation of prisoners representing themselves. Like everyone else, prisoners have a constitutional right to an appeal. But, unlike others, prisoners proceeding pro se cannot do what appellants not imprisoned can do to monitor their filings and to ensure that the appellate court receives them on time.

[1] It is not accurate to call this "a solution in search of a problem." The problem is estimated to have arisen in the Supreme Court at least 10 times a year in recent years. Of course, even one lost appeal is worthy of our attention because it is the potential loss of a legal right. As a consequence of the problem under consideration here, prisoners have lost not only their state appeals but their federal habeas corpus appeals. Their federal appeals are considered procedurally deficient if their state appeals were rejected as untimely.

This fact is unaffected by the length of the appeal period. No matter the length of the period, the problem is the same. Assume that a prisoner must put his or her appeal in the hands of prison authorities four days before the deadline in order to ensure it reaches the court on time. In that case, that prisoner has four fewer days to file than another appellant who can deliver his or her appeal to the clerk in person on the deadline day. Because the length of the appeal period is irrelevant with respect to the issue now before the Court, we should leave changes in its length to a separate administrative proceeding.

The prisoner acting pro se has no choice but to entrust the forwarding of his or her appeal to prison authorities over whom he or she has no control. The moment the prisoner hands a timely claim of appeal to a prison official, he or she becomes powerless to ensure its timely delivery to the court. Repeatedly, in this Court, a prisoner claims to have given his or her appeal to prison officials well in advance of the filing deadline, yet it arrived at the court late.

Federal courts have encountered the same problem. And, over 20 years ago, they resolved it by adopting a federal prison mailbox rule. Numerous other states have followed their lead.[2] It is time for Michigan to do the same.

CORRIGAN, J. Although I will carefully consider any public comments received concerning these proposed amendments of the Michigan Court Rules, I continue to question the wisdom of adopting a prison mailbox rule. Michigan already has an inordinately generous method for ensuring that imprisoned parties have sufficient time to assemble and file appeals; we allow parties 12 months to file late appeals if they did not timely file appeals of right or applications for leave. MCR 7.205(F)(3). Our late appeal period indiscriminately allows all parties in most proceedings 12 additional months to file. As a result, it permits equal treatment of any party, including a prison inmate, who may have difficulty accessing the United States Postal Service mail or obtaining documents to support his appeal. It also permits our court clerks to accept an inmate's filing without the need for proof or debate concerning when he placed his documents in the outgoing mail. Because we already provide this generous period for late appeals, I believe that a prison mailbox rule is a solution in search of a problem in Michigan. I would not join the minority of jurisdictions with prisoner mailbox rules.[3]

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[2] To date, 20 states have adopted a prison mailbox rule. An additional 10 states, including Michigan, have rejected such a rule, and 20 states have not decided the question. See 29 ALR 6th 237, *Application of "prisoner mailbox rule" by state courts under state statutory and common law*.

[3] See 29 ALR 6th 237, *Application of "prisoner mailbox rule" by state courts under state statutory and common law*, for information on the minority of states that have adopted such rules.

First, our appellate rules differ significantly from those jurisdictions with prison mailbox rules. My research has yet to identify a state court system that utilizes a prison mailbox rule and *also* gives litigants 12 months to apply for late appeals. Rather, states with mailbox rules afford shorter periods for appeal. Commonly they give parties 30[4] or 42[5] days within which to appeal; some states also allow an additional 30 day extension of the period for appeal upon a showing of good cause or excusable neglect.[6] No state in the Union with a mailbox rule affords 12 months for late appeals. Indeed, the federal system—which employs a prison mailbox rule on which the proposed Michigan rule is modeled—provides only 10 days during which a criminal defendant may file an appeal. Fed R App Pro 4(b)(1). I would not adopt this new system while we continue to permit a prisoner a much longer 12 month period during which to apply for late appeal.

If this Court ultimately decides to adopt a mailbox rule in Michigan, I suggest that we also shorten our current 12 month period in accord with the appeals periods in other states with mailbox rules. The disadvantage of Michigan's unusually lengthy 12 month period is that it delays finality for litigants and crime victims. If we adopt a mailbox rule, I would not further delay finality by tacking such a rule onto our current scheme of generous appellate deadlines. Rather, I would suggest adopting shorter periods for appeal as in other states.

Next, the federal mailbox rule—which originated from *Houston v Lack*, 487 US 266 (1988)—arose from the United States Supreme Court's interpretation of Rule 4(a)(1) of the Federal Rules of Appellate Procedure; the Court concluded that a pro se defendant who is incarcerated in a federal prison "files" his notice of appeal under this rule when he delivers it to prison authorities. See *O'Rourke v State*, 782 SW2d 808, 809 (Mo App, 1990). But many states have rejected the application of *Houston* to the text of individual state court rules. See *id.* and cases cited therein. Michigan's rule, MCR 7.202(4), clearly states that "'filing' means the delivery of a document to a court clerk and the receipt and acceptance of the document by the clerk with the intent to enter it in the record of the court." I would continue to adhere to this text, which provides a bright line, certain rule that applies to all litigants. A mailbox rule, in contrast, establishes evidentiary burdens for prisoners seeking an appeal, who will be required to prove and likely litigate issues such as when and whether they delivered documents to prison authorities.

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[4] E.g., Massachusetts, Mass R App Pro 4(b); Mississippi, Miss R App Pro 4(a); Ohio, Oh App R 4(a).

[5] E.g., Alabama, Ala R App Pro 4(b)(1); Idaho, Idaho App R 14(a).

[6] E.g., Massachusetts, Mass R App Pro 4(c); Mississippi, Miss R App Pro 4(g).

A mailbox rule also singles out prisoners for special treatment even though other parties have difficulty accessing the United States Postal Service mail or assembling documents in support of their appeals. On this point, I disagree with Justice Markman's statement that prisoners belong to a "lone class of persons lacking ultimate control over the timely filing of their pleadings." Indeed, I note Justice Scalia's dissent in *Houston* 487 US at 277, where, in criticizing the majority's interpretation of Fed R App Pro 4(a)(1), he listed equally deserving beneficiaries of a mailbox rule, stating:

> It would be within the realm of normal judicial creativity (though in my view wrong) to interpret the phrase "filed with the clerk" to mean "mailed to the clerk," or even "mailed to the clerk or given to a person bearing an obligation to mail to the clerk." But interpreting it to mean "delivered to the clerk or, if you are a prisoner, delivered to your warden" is no more acceptable than any of an infinite number of variants, such as: "delivered to the clerk or, if you are out of the country, delivered to a United States consul"; or "delivered to the clerk or, if you are a soldier on active duty in a war zone, delivered to your commanding officer"; or "delivered to the clerk or, if you are held hostage in a foreign country, meant to be delivered to the clerk."

Justice Scalia's comments persuade me that we need a single, defined rule to make clear when an appeal is filed. If this Court makes an exception for one category of appellants, we exclude other worthy groups. But to incorporate all worthy groups, we would impossibly complicate the clerk's business.

Finally, in considering the proposed amendments, I remind the Court that we have considered adopting a mailbox rule on at least eight prior occasions, but each time we have declined to adopt such a rule for reasons that include those discussed above. Adopting such a rule would not only fail to improve our current, generous system, it would also create new problems and inequities.

YOUNG, J., concurs with CORRIGAN, J.

MARKMAN, J. I share Justice Corrigan's concerns about the length of the delayed appeals process in Michigan and also share her interest in reviewing and reconsidering the relevant court rules. However, I fail to see the connection between this problem and the merits of introducing a mailbox rule in Michigan. The purpose of a mailbox rule is to ensure that the lone class of persons lacking ultimate control over the timely filing of their pleadings, inmates in the custody of the Department of Corrections, can be assured that their pleadings will be filed in a timely fashion. Whether Michigan's period for delayed appeals is 30 days or 180 days or one year, inmates, in the absence of a mailbox rule, will continue to be denied the assurance that their pleadings are timely filed, and

will remain at the sufferance of whatever mishandling or delays on the part of the department may sometimes occur in transmitting pleadings to the proper court. I am not convinced that every detail of the proposed rule is perfect, but I am convinced that the linkage asserted by Justice Corrigan does not exist and that some form of a mailbox rule in fairness ought to be adopted.

Staff Comment: These proposed amendments would create a prison mailbox rule, which would allow a claim of appeal or application for leave to appeal to be deemed filed when a prison inmate acting pro se places the legal documents in the prison's outgoing mail. The proposed rule would apply to appeals from administrative agencies, appeals from circuit court (both claims of appeal and applications for leave to appeal), and appeals from decisions of the Court of Appeals to the Supreme Court, and would apply prospectively.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2009-07.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 25, 2009

Clerk